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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JOHNNY HOSEY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

RICHARD COSTOLO, MIKE GUPTA, LUCA BARATTA, JACK DORSEY, PETER CHERNIN, PETER CURRIE, PETER FENTON, DAVID ROSENBLATT, EVAN WILLIAMS, and TWITTER, INC.,

Defendants.

Case No. 16-CIV-02228

CLASS ACTION

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

Hearing Date: August 16, 2018
Hearing Time: 9:00 a.m.
Hearing Judge: Hon. Marie S. Weiner
Hearing Dept: Dept. 2

Date Action Filed: Nov. 4, 2016
Trial Date: Not Set

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I. INTRODUCTION

Plaintiff Johnny Hosey ("Plaintiff"), by and through his undersigned counsel, The Rosen Law Firm, P.A. ("RLF") and Sarraf Gentile LLP ("SG") (collectively, "Plaintiff's Counsel"), respectfully submits this Memorandum of Points and Authorities in support of his unopposed motion for an award of attorneys' fees, reimbursement of litigation expenses, and an incentive award for Plaintiff.[1]

Having achieved an immediate and significant $2.5 million cash benefit for the Class, Plaintiff's Counsel now seeks an award of attorneys' fees in the amount of one-third of the Settlement Amount, or $833,333.33, which represents a negative 0.77 multiplier on Plaintiff's Counsel total lodestar of $1,076,079 (based on 1,594.6 hours of attorney and paralegal work).[2]

Plaintiff's Counsel also seeks reimbursement of out-of-pocket litigation expenses incurred in connection with the prosecution of this action in the amount of $99,813.25. Rosen Decl. ¶7; Sarraf Decl. ¶6. These expenses were both reasonable and necessary for the successful prosecution and resolution of the claims against Defendants. Plaintiff's Counsel incurred these expenses with the attendant risk of non-payment. Additionally, Lead Plaintiff Johnny Hosey seeks an award of $10,000 each to compensate him for his time spent and service to the Settlement Class.[3]

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[1] Unless otherwise set forth, this Memorandum incorporates by reference the definitions in the Stipulation and Agreement of Settlement (the "Stipulation"), filed in connection with Plaintiff's Unopposed Motion for Preliminary Certification of Settlement Class and for Preliminary Approval of Settlement.

[2] *See* Joint Declaration of Laurence Rosen and Ronen Sarraf in Support of Final Approval of Settlement ("Joint Decl." or "Joint Declaration"), filed herewith, ¶68. *See also* Declaration of Laurence Rosen on Behalf of The Rosen Law Firm, P.A. in Support of Final Approval of Settlement and Reimbursement of Costs and Expenses ("Rosen Decl." or "Rosen Declaration") (Ex. 1 to Joint Decl.), filed herewith, ¶5; Declaration of Ronen Sarraf on Behalf of Sarraf Gentile LLP in Support of Final Approval of Settlement and Reimbursement of Costs and Expenses ("Sarraf Decl." or "Sarraf Declaration") (Ex. 2 to Joint Decl.), filed herewith, ¶4.

[3] *See* Declaration of Johnny Hosey in Support of Final Approval of Settlement and Reimbursement of Plaintiffs' Time and Expenses ("Hosey Decl." or "Hosey Declaration") (Ex. 4 to Joint Decl.), filed herewith, ¶13.

In light of the risks faced, the complexity of the case, the quality of legal work performed, the necessary expenses incurred, the amount of time and effort expended by Plaintiff's Counsel, and the size of the fee and expense request in relation to the Settlement achieved, the fee and expense requests are both fair and reasonable, and warrant approval.

II. THE COURT SHOULD GRANT PLAINTIFF'S COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES IN THE AMOUNT OF ONE-THIRD OF THE SETTLEMENT AMOUNT

A. This Court Should Award Attorneys' Fees to Plaintiff's Counsel By Using the "Percentage of Recovery" Method

Although California "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method," *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 254, *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, the increasingly common trend in this State favors the adoption of the "percentage of recovery" method. According to the Supreme Court of California: "Currently, all the circuit courts either mandate or allow their district courts to use the percentage method in common fund cases; none require sole use of the lodestar method. Most state courts to consider the question in recent decades have also concluded the percentage method of calculating a fee award is either preferred or within the trial court's discretion in a common fund case." *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 493.

The case law sets forth the reasons for this emerging trend. Two rationales support the common fund doctrine: (1) unjust enrichment—"that all who will participate in the fund should pay the cost of its creation or protection and that this is best achieved by taxing the fund itself for attorney's fees," *see Serrano v. Priest* (1977) 20 Cal.3d 25, 35 n.5; and, (2) "salvage"—"encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful," *see Estate of*

Stauffer (1959) 53 Cal.2d 124, 132.[4] Thus, the percentage method provides several advantages over the lodestar method: "relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503.

On the other hand, courts have identified several drawbacks associated with the lodestar method. As the First District Court of Appeal has observed, "the accepted practice of applying the lodestar ... to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overburdened district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process." *Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 31 n.5 (citation omitted). Moreover, " '[a] complete lodestar analysis ... would ... likely require a 'second major litigation,' " ... which conflicts with the admonition of the Supreme Court … that a request for attorney fees should not result in a 'second major litigation.' " *Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 31 n.5 (citations omitted).

In short, this Court should join the emerging consensus of "federal and state courts alike" that "have increasingly returned to the percent-of-fund approach [in common fund cases], either endorsing it as the only approach to use, or agreeing that a court should have flexibility to choose between it and a lodestar approach, depending on which method will result in the fairest determination in the circumstances of a particular case." *Laffitte v. Robert Half Int'l, Inc.* (2016)

[4] *See also, e.g., Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) (opining that contingent fees "eliminate" a lawyer's incentive to "settle for a lower recovery coupled with a payment for more hours" by "align[ing] interests of lawyer and client," while "ensur[ing] a reasonable proportion between the recovery and the fees assessed to defendants").

1 Cal.5th 480, 494. Regardless of which method this Court elects to use in this particular case, however, the ultimate outcome is the same: that the requested fee is reasonable.

B. Plaintiff's Counsel's Requested Fee of 33% of the Settlement Amount is Reasonable

"When class action litigation establishes a monetary fund for the benefit of class members, and the trial court in its equitable powers awards class counsel a fee out of the fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503. "Numerous California trial courts have awarded attorneys' fees calculated as a percentage of a common fund, many even awarding a percentage greater than the thirty percent awarded here." *In re California Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 103194, at *9 (Cal. Super. Ct. Alameda Cty. Oct. 22, 1998) (collecting cases). Thus, "the percentage method for awarding attorneys' fees from fixed sum common funds is well-established by California law and practice, and is appropriately used here." *Id.* at *9.

The percentage method for awarding counsel fees is well established not only in California law relating to class actions generally, but also in the specific context of federal securities class actions. In federal securities class actions settled between 1996 and 2014, the median fee award for cases with settlements of less than $5 million, as here, has been one-third of the fund. *See* Dr. Renzo Comolli and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review*, at 34 (2015);[5] *see also, e.g., In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (awarding one-third of the fund, and collecting cases awarding one-third of the fund). This is true even in the Ninth Circuit, where the 25 percent "benchmark" generally applies, *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d

[5] Available at: <http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf>

268, 272 (9th Cir. 1989), because "in most common fund cases, the award exceeds the benchmark." *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008).[6]

Consistent with these developments, this Court itself has awarded counsel fees of one-third of the settlement amount in at least two recent prior securities class actions. *See In re Avalanche Biotechnologies, Inc. Shareholder Litig.*, No. CIV536488, Judgment and Order Granting Final Approval of Class Action Settlement (Jan. 19, 2018) (awarding Plaintiffs' Counsel $4.29 million, or 33% of the settlement fund); *Hayden v. Worldwide Energy & Manufacturing USA, Inc., et al.*, No. Civ. 518333, Final Order and Judgment (May 13, 2015) (awarding Plaintiffs' Counsel $538,333, or 33% of the settlement fund).

Therefore, an award of one-third of the Settlement Amount is reasonable.

C. Using the Lodestar Method to "Cross-Check" the Fee Generated By the "Percentage of Recovery" Method Confirms that the Requested Fee is Reasonable

The Supreme Court of California has held that "trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee." *Laffitte*, 1 Cal.5th at 506. A lodestar cross-check provides "a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee." *Id.* at 504. If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used

[6] *See also, e.g., In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming a one-third award in a case in which settlement fund was $12 million); *In re Mego Finan. Corp.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming a one-third award in a case in which settlement fund was $1.725 million).

to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage." *Id.* at 504.

As shown below, performing a lodestar cross-check on the percentage fee requested above produces an "imputed multiplier" that falls well within—indeed, below—the "normal range," confirming the reasonableness of the request. Thus, this Court's analysis should be consistent with the experience of most courts performing the lodestar cross-check: " 'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.' " *Laffitte v. Robert Half Int'l Inc.* (2014) 231 Cal.App.4th 860, 878.

1. The Lodestar Calculation Yields a "Base Amount" That Exceeds the Result Produced By the Percentage Method

The lodestar method involves a straightforward initial calculation: "The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 26. Billing rates are deemed appropriate if they are reasonable in light of rates in the relevant community. In securities cases, courts determine whether plaintiffs' counsel's fees are reasonable by comparison firms that defend securities class actions. *In re Telik, Inc. Sec. Litig.* 576 F. Supp. 2d 570, 588 (S.D.N.Y. 2008); *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *14 n.8 (S.D.N.Y. Dec. 19, 2014).

Declarations from counsel setting forth their firms' respective lodestar calculations based on counsel's review of contemporaneous time records provide a sufficient basis for a fee award. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 ("California case law permits fee awards in the absence of detailed time sheets"); *id*. at 255 ("Here plaintiffs' attorneys submitted declarations evidencing the reasonable hourly rate for their services and establishing the number of hours spent working on the case"); *see also Dunk v. Ford Motor Co.* (1996) 48

Cal.App.4th 1794, 1810 (stating that lodestar calculation could be based on counsel's estimates of time spent).

As set forth in the Rosen and Sarraf Declarations, Plaintiff's Counsel expended 1,594.6 hours for an aggregate lodestar of $1,076,079 in the litigation of this case. Rosen Decl. ¶5; Sarraf Decl. ¶4. As a result, the composite billing rate for all attorneys representing Plaintiff in this action was about $674, which this Court should deem reasonable for securities class actions. *See, e.g.*, *Roberti v. OSI Sys., Inc.*, No. CV-13-09174 MWF (MRW), 2015 WL 8329916, at *7 (C.D. Cal. Dec. 8, 2015) (approving as reasonable lead counsel's attorney rates ranging from $525 to $975, "given that each has at least 15 years of litigation experience").

2. The Lodestar "Base Amount" Should Be Enhanced

This Court's lodestar analysis need not end with its initial calculation. The Court may adjust, either upward or downward, its initial lodestar figure in consideration of several additional factors: "[T]he lodestar formula does not limit consideration to hours expended and hourly rate, though that is the foundation of the calculation. The base amount produced by multiplying hours spent on the case by a reasonable hourly rate 'may then be increased or reduced by application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit.' " *Lealao*, 82 Cal.App.4th at 40.

"California trial courts have considerably wider latitude than their federal counterparts in the selection of factors that may be used to adjust the lodestar and that, therefore, 'an upward or downward adjustment from the lodestar figure will be far more common under California law than under federal law.' " *Lealao*, 82 Cal.App.4th at 42. Specifically, "certain factors California courts can use to enhance a lodestar award, such as the novelty and complexity of the issues, the special skill and experience of counsel, and the contingent nature of the recovery, cannot be used

to increase an award in federal courts because they are presumed to be already incorporated into the lodestar figure." *Id.* at 42.

"Whether relying on the percentage or lodestar method for determining a fee award, California courts consider the same basic factors. Each factor is considered as appropriate." *X-Ray Film*, 1998 WL 103194, at *9. The relevant factors here include: "(1) the result Class Counsel obtained; (2) the time and labor required of the attorneys; (3) the contingent nature of the case and the delay in payment to Class Counsel; (4) the extent to which the nature of the litigation precluded other employment by Class Counsel; (5) the experience, reputation, and ability of the attorneys who performed the services, the skill they displayed in the litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the clients to the fee agreement." *Id* at *9.

The result obtained. The Settlement Amount, when viewed as a percentage of the total estimated damages from Plaintiff's "best case" damages scenario, is approximately 5.8%, which is well above the median percentage of investor losses recovered in securities class action settlements. *See Omnivision*, 559 F. Supp. 2d at 1042 (approving 6% recovery of maximum damages) (citing *Heritage Bond*, 2005 WL 1594403, at *8–9 (average recovery between 2% to 3% of maximum damages)). When viewed from Defendants' "best case" damages scenario, of course, the Settlement Amount fares even better. Assuming Plaintiff were able to establish all elements of his claims, Defendants argued that, after adjusting for traceability being lost upon the commingling of registered and unregistered shares, Plaintiff's maximum damages would fall from the roughly $43.2 million to no more than $11 million. From that $11 million damages ceiling, Defendants then argued that once their negative causation defense is taken into account, Plaintiff's damages are zero.

Thus, the result obtained here therefore favors an upward adjustment of the lodestar figure.

The time and labor required. "[N]umerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees." *Natural Gas Anti-Trust Cases I, II, III & IV* (Cal. Super. Ct., Dec. 11, 2006, 4221) 2006 WL 5377849, at *3; *see also Wershba*, 91 Cal.App.4th at 255 ("multipliers can range from 2 to 4 or even higher" and awarding a multiplier of 2.36); *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76 (remanding for a lodestar enhancement of "two, three, four or otherwise"); *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465 (affirming a 12-times multiplier of counsel's hourly rate and expressly rejecting the argument that the requested fee was exorbitant or unconscionable); *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (2.52 multiplier was "fair and reasonable") *In re Vitamin Cases* (Cal. Super. Ct. Apr. 12, 2004) 2004 WL 5137597, at *11, 14 (approving "low" multiplier of 1.99).

The requested fee here results in a negative multiplier of approximately 0.78, which is considerably lower than multipliers that have been deemed reasonable by courts in California and nationwide.

Additional hours and resources will necessarily be expended in assisting Settlement Class Members with their Proofs of Claim, shepherding the claims process, and responding to Settlement Class Members' inquiries. *See In re BioScrip, Inc. Sec. Litig.*, No. 13-CV-6922 (AJN), 2017 WL 3208941, at *23 (S.D.N.Y. July 26, 2017) (considering lead counsel's work that remained to be done after order); *Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 CIV. 4825 JLC, 2013 WL 1364147, at *7 (S.D.N.Y. Apr. 2, 2013) ("The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request").

The time and labor required therefore favors an upward adjustment of the lodestar figure.

The contingent nature of this case and delay in payment. By assuming the risk of his or her client receiving little or no recovery, an attorney who takes a case on contingency expects a higher fee than an attorney who is paid an hourly or flat fee, win or lose. *Rader v. Thrasher* (1962) 57 Cal.2d 244, 253; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist*. (1985) 172 Cal.App.3d 914, 955. "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133. Thus, courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (the level of risk taken by plaintiff's counsel is " 'perhaps the foremost' factor" in considering the appropriate percentage award).

Further, in accepting a contingency fee, "[t]he lawyer agrees to delay receiving his fee until the conclusion of the case, which is often years in the future," and "in effect finances the case for the client during the pendency of the lawsuit." *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 288. "The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." *Ketchum*, 24 Cal.4th at 1132-33.

The contingent nature of this case and the delay in receiving payment therefore favor an upward adjustment of the lodestar figure.

The extent to which this litigation precluded other employment by counsel. This factor is not applicable here because this action did not preclude other employment by Plaintiff's Counsel.

Plaintiff's Counsel's skill, experience, reputation, and ability, and the novelty, complexity, and difficulty of this case. "Lead Counsel's skill and efficiency is 'measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.' " *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, No. 11-2164, 2017 WL 2734714, at *11 (D.N.J. June 26, 2017).

Plaintiff's Counsel has earned a national reputation for zealous representation in securities cases. *See, e.g.*, *Dartell v. Tibet Pharmaceuticals, Inc.*, No. 14-3620, 2017 WL 2815073, at *10 (D.N.J. June 29, 2017) ("Courts have recognized that the Rosen Firm "has extensive experience navigating the particular complexities of litigation") (citing *Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 540 (S.D.N.Y. 2015)). *Nguyen v. Radient Pharm. Corp.*, No. SACV 11-00406 DOC, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) (noting that The Rosen Law Firm "took on significant risk in this case, working thoroughly and enthusiastically through extensive litigation that required significant expert involvement"); *Pace v. Quintanilla*, No. SACV 14-2067-DOC, 2014 WL 4180766, at *3 (C.D. Cal. Aug. 19, 2014) ("Indeed, The Rosen Law Firm has appeared before this Court several times before, and the Court is confident that it has the necessary skill and knowledge to effectively prosecute this action"), *Richardson v. TVIA, Inc.*, No. C 06 06304 RMW, 2007 WL 1129344, at *6 (N.D. Cal. Apr. 16, 2007) (describing The Rosen Law Firm as "highly qualified, experienced counsel"); *Bensley v. FalconStor Software, Inc.*, 277 F.R.D. 231, 242 (E.D.N.Y. 2011) ("As the court in [another case] concluded, based on the [Rosen Law] Firm's experience, 'the Rosen Law Firm is well-qualified to serve as lead counsel in this matter' ")).

Moreover, "the competence of opposing counsel demonstrates that Lead Counsel prosecuted this case with skill and efficiency." *P. Van Hove BVBA*, 2017 WL 2734714, at *11. Throughout the litigation and settlement negotiations, Defendants have been represented by very skilled and highly respected counsel, Simpson Thacher & Bartlett LLP, one of the largest and most respected law firms in the world. Defendants' counsel brought considerable experience and expertise to bear and vigorously defended this Action.

Further, courts across the nation have recognized the amount of skill required and the difficulties inherent in trying nationwide securities class actions, such as this case. *See, e.g.*, *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987) (observing that "prosecution and management of a complex national class action requires unique legal skills and abilities"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) ("the courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute"); *Beaver Cty. Emp'ees Ret. Fund v. Tile Shop Holdings, Inc.*, No. 0:14–cv–00786–ADM–TNL, 2017 WL 2588950, at *2 (D. Minn. 2017) (noting that "[s]ecurities claims proceeding as a class action present complex and novel issues, and successfully prosecuting these types of actions has become more difficult with the adoption of the Private Securities Litigation Reform Act").

Plaintiff's Counsel faced significant risks in establishing liability/damages and confronted a variety of challenging issues in litigating this case. A discussion of these issues appears in the Memorandum of Points & Authorities in Support of Plaintiff's Unopposed Motion for Final Approval of Settlement, which is incorporated herein by reference.

Based upon all of the applicable considerations, therefore, Plaintiff's Counsel's skill, experience, reputation, and ability, and the novelty, complexity, and difficulty of this case weigh in favor of an upward adjustment in the lodestar figure.

The informed consent of the client to the fee agreement. Under California law, it is permissible to rely on this factor to award the plaintiff the exact fee provided in its contingency fee agreement, so long as the court considers the other factors mandated by the test. *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465, 479.

In *Demeter*, plaintiffs' counsel's retainer with Pentwater acknowledged that counsel may seek up to one-third of the fund, subject to the Court's approval; given Pentwater's interest and sophistication, the retainer in *Demeter* was deemed presumptively reasonable. The Court should reach a similar conclusion here. Plaintiff Hosey's retainer agreement specifically states that "the Client acknowledges that plaintiffs' counsel may apply for a fee of up to 33⅓% of the recovery plus disbursements, subject to court approval." Considering Plaintiff Hosey's demonstrated interest in the prosecution of this case, as well as his level of sophistication, given his education and occupation as a campaign finance and lobbying compliance professional at the San Francisco Ethics Commission, Hosey Decl. at ¶4, this Court should deem Plaintiff Hosey's retainer agreement presumptively reasonable. The informed consent of Plaintiff Hosey to the fee request, therefore, favors an upward adjustment of the lodestar figure.

Since all applicable factors support an upward adjustment of the lodestar figure, which even without such an adjustment confirms that the requested fee is reasonable, the Court should award Plaintiff's Counsel their requested fee of one-third of the Settlement Amount.

III. THE COURT SHOULD GRANT PLAINTIFF'S COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES REASONABLY INCURRED IN CONNECTION WITH THIS ACTION

The common fund doctrine also provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees and costs. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). In California, the common fund doctrine is "frequently applied in class actions when the efforts of the attorney for

the name representatives produce monetary benefits for the entire class," as is the case here. *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc*. (2005) 127 Cal.App.4th 387, 397.

Under the common fund doctrine, "class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses." *New England Health Care Emp'ees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006). In determining whether the requested expenses are compensable, the Court considers "whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases." *Id.*

The larger expenses incurred by Plaintiff's Counsel in the prosecution of this action include, among other things, fees and costs associated with the mediation, the retention of an expert damages consultant, travel for hearings before this Court, filing fees, and electronic legal research charges. *See* Rosen Decl. ¶7; Sarraf Decl. ¶6. These types of expenses are considered to be "routinely billed by attorneys to paying clients in similar cases," and therefore, compensable.[7]

[7] *See, e.g., New England Health Care*, 234 F.R.D. at 635 (finding the following categories of expenses to be "routinely charged to hourly fee-paying clients and thus should be reimbursed out of the settlement fund": fees for "experts and consultants," and costs "associated with maintaining an electronic database; computerized research; travel and lodging expenses; photocopying cost; filing and witness fees; postage and overnight delivery; and the cost of court reporters and depositions"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 364 (E.D.N.Y. 2010) (approving reimbursement for expenses including, among other things, expert fees, electronic research charges, long distance telephone and facsimile charges, postage and delivery expenses, discovery costs, filing fees, photocopying, expenses associated with locating and interviewing dozens of witnesses, and out-of-town travel expenses"); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *10-12 (S.D.N.Y. Nov. 7, 2007) (approving reimbursement for "consultant and expert fees, photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for service of subpoenas to witnesses, on-line research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel and other expenses directly related to the prosecution of this Action"); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1367-72 (N.D. Cal. 1996) (approving reimbursement for expert fees, investigator expenses, photocopying, postage, telephone, travel, computerized legal research, filing fees, and a wide range of "other" expenses).

Accordingly, this Court should approve Plaintiff's Counsel's request for reimbursement in the amount of $99,813.25 in litigation costs and expenses incurred in the prosecution of this action.

IV. THE COURT SHOULD GRANT PLAINTIFF'S REQUEST FOR A COMPENSATORY/INCENTIVE PAYMENT

Plaintiff Hosey may be compensated for his time and effort in overseeing the prosecution of this case. The federal securities law that forms the basis of this action expressly allows for an "award of the reasonable costs and expenses (including lost wages) directly relating to the representation of the class" to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Indeed, "[c]ourts ... routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *New England Health Care,* 234 F.R.D. at 635; *see also Nguyen*, 2014 WL 1802293, at *11 (stating that compensatory awards to named plaintiffs are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general").

Plaintiff's requested award of $10,000 is "in line with other incentive awards in this [Ninth] Circuit, although perhaps somewhat on the high end of the acceptable range." *Chu v. Wells Fargo Investments, LLC*, Nos. C 05–4526 MHP, C 06–7924 MHP, 2011 WL 672645, at *5 (N.D. Cal. Feb. 16, 2011) (awarding $10,000 each to 2 plaintiffs who had been named plaintiffs since the case's inception). Plaintiff's request also is consistent with incentive awards for plaintiffs granted by courts in this State. *See, e.g., Paton v. Advanced Micro Devices, Inc.*, No. 1-07-CV-084838,

Final Approval Order and Judgment (Cal. Super. Ct., Santa Clara Cty., Aug. 22, 2014) (awarding $10,000 to lead plaintiff based on his "active[ ] involve[ment] in the class litigation and his "expend[iture] [of] significant time and effort to assist in the prosecution"). Based upon Plaintiff's demonstrated commitment to and active participation in this case, *see* Hosey Decl. ¶¶7-13, this Court should grant his requested award of $10,000. Indeed, courts both in this State and elsewhere have awarded similar or greater amounts to plaintiffs based on comparable or even less evidence of demonstrated commitment to the case.[8]

Accordingly, Plaintiff requests an award of $10,000 for the time he spent on this case.

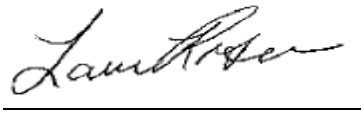
[8] *See, e.g., In re Magma Design Automation, Inc. Sec. Litig.*, No. C 05-02394 CRB, 2009 WL 10696109, at *3 (N.D. Cal. Mar. 27, 2009) (awarding lead plaintiff $32,600 based on "lost wages and hours spent in this matter. Weiler attended Court hearings, participated in his deposition, reviewed pleadings, and committed his schedule to attend the scheduled trial"); *In re CV Therapeutics, Inc. Sec. Litig.*, No. C 03-3709 SI, 2007 WL 1033478, at *2 (N.D. Cal. Apr. 4, 2007) (awarding lead plaintiff $26,000 for "reimbursement of time and expenses incurred in representing the class"); *Thieriot v. Celtic Ins. Co.*, No. 10–04462 LB, 2011 WL 1522385, at *8 (N.D. Cal. Apr. 21, 2011) (awarding plaintiff $25,000 for her efforts in protecting a class of only 390 investors); *Johnson v. US Auto Parts Network, Inc.*, No. CV07–2030–GW(JCx), 2008 WL 11343481, at *5 (C.D. Cal. Oct. 9, 2008) (awarding lead plaintiff $12,500 because she "fully participated and performed many tasks in connection with this litigation"); *In re Xcel Energy, Inc. Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 in total to be divided among the eight lead plaintiffs in securities action because they were "actively involved throughout the litigation," having "communicated with counsel throughout the litigation, reviewed counsels' submissions, indicated a willingness to appear at trial, and were kept informed of the settlement negotiations"); *Rausch v. Hartford Fin. Servs. Grp.*, No. 01–CV–1529–BR, 2007 WL 671334, at *3 (D. Or. Feb. 26, 2007) (awarding plaintiff $10,000 in light of his "perseverance in pursuing this matter to a successful outcome"); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 610 (D.N.J. July 30, 2010) (awarding each of the 9 class representatives $10,000 because they "were not in any sense figurehead plaintiffs as is sometimes the case in class action suits. They were active clients"), *rev'd on other grounds, Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012); *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 165-66 (S.D.N.Y. 2011) (awarding each of the lead plaintiffs $10,000 each because they "devoted substantial effort and time to this case, including reviewing filings, producing documents, and travelling to be deposed, making these requests for awards reasonable"); *Williams, Inc. v. Kaiser Sand & Gravel Co., Inc.*, No. C91-4028 MHP, 1995 WL 1781676, at *2 (N.D. Cal. Sept. 19, 1995) (awarding class representative $10,000 "as compensation for its time and effort expended in the case"); *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1268 (N.D. Ill. 1993) (awarding each of the three class representatives $10,000 because they "made substantial contributions to the development of the case," which "benefitted the class as a whole").

V. CONCLUSION

For reasons set forth above and in the declarations submitted in conjunction with this motion, the Court should grant Plaintiff's Counsel's application for an award of attorneys' fees, reimbursement of reasonable expenses, and an award to Lead Plaintiff for services rendered to the Settlement Class.

Dated: July 3, 2018

THE ROSEN LAW FIRM, P.A

By: 

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